his publishing his *History of Contract in Early English Equity,* in the Oxford Studies in Jurisprudence. In 1912, Oxford conferred upon him the degree of B.Litt. From 1912 to 1919 he was first assistant professor and then professor of law in the University of Michigan Law School. There, as at Yale, he received ungrudging recognition as a legal scholar and the deepest of affection as a man. Professor Barbour had published several scholarly and original articles in law reviews and had just begun a series of lectures on legal history on the Carpentier foundation at Columbia University. The Yale Law School takes pride in its recognition of his already high accomplishment, holds in high regard the memory of his modest and winning personality, and mourns the heavy and untimely loss to legal scholarship and to the profession of law teaching.

POWER OF EQUITY OVER PUBLIC ELECTIONS

In a recent Illinois case the secretary of state proposed to submit to the electors certain questions of public policy. It was alleged that to do so would be to exceed his power under the state constitution, and an injunction was asked to prevent it. It was held that "the court had no jurisdiction";[1] that "an injunction would not issue out of a court of equity for the purpose of restraining the holding of an election or in any manner directing the mode in which the same should be conducted" on the ground that it was a matter of a political nature, with which courts of equity had nothing to do. *Emerson v. Payne* (1919, Ill.) 125 N. E. 329. This limitation on the power of equity is asserted by the highest authorities,[2] but some of those courts which adopt it are inclined to leave for themselves a loophole;[3] and in the last thirty years in some very important cases it has been disregarded when a public wrong without other adequate remedy demanded it.[4]

[1] The court evidently meant no power to render any valid decree, even an erroneous one. For comment on the ambiguity of the word "jurisdiction" see (1915) 15 COL. L. REV. 106-107 and COMMENT (1919) 28 YALE LAW JOURNAL, 483, note 4.

[2] 4 Pomeroy, *Equity Jurisprudence* (4th ed. 1919) sec. 1753. "The traditional limits of proceedings in equity have not embraced a remedy for political wrongs. Holmes, J., in *Giles v. Harris* (1903) 189 U. S. 475, 486, 23 Sup. Ct. 639, 642.

[3] "We should not care to commit ourselves to the doctrine that a court of equity will not under any circumstance interfere for the protection of political rights." *Winnett v. Adams* (1904) 71 Neb. 817, 825, 99 N. W. 681, 684.

[4] *State ex rel. Lamb v. Cunningham* (1892) 83 Wis. 90, 53 N. W. 35 (restraint of election under unconstitutional apportionment law); *People v. Tool* (1905) 35 Colo. 225, 86 Pac. 224 (injunction against conducting an election fraudulently); *cf. Giddings v. Blacker* (1892) 93 Mich. 1, 52 N. W. 944 (*mandamus* used to restrain, in the absence of original jurisdiction to grant injunction); *cf. Attorney General v. Suffolk County Commissioners* (1916) 224 Mass. 598,

An analysis of a long series of cases in Illinois that have had much to do with the firm establishment of this limitation will show that the grounds for it are two. In the first place elections seldom threaten to cause direct damage to property, and "property" relations are the usual basis for injunctive relief. This basis for judicial action of any kind is historical and not altogether logical, as Dean Pound has pointed out.[5] That it has resulted in some unjust situations in our law cannot be doubted,[6] but it is deep-rooted in our legal thought. The courts often strain a layman's understanding of the word property until its meaning is even more elusive than usual, in order to avoid the force of the rule and to vindicate something quite different from what we are accustomed to consider damage to property.[7] The courts above mentioned which denied the universality of the rule as to political matters and elections are among the few in this class of cases that have placed their action squarely on the ground of irreparable injury to the public weal. This, it is believed, is sufficient reason for the intervention of equity whether damage is threatened to property or not.[8]

In the second place, courts are cautious in interfering with an officer of the political branch of the government, and that is what restraint of an election usually means. This, it is said, attacks the foundation of our governmental system—the three-fold separation of powers.[9] None of the cases analyze carefully, however, the possibilities of the situation. It is submitted that the acts which are sought to be restrained may be of three kinds: (1) acts of the executive within its discretion under power given by the constitution or some valid law; (2) acts beyond the power given by law or constitution; and (3) acts in pursuance of duties charged by invalid laws or invalid constitutional provisions. Cases involving any one of these classes are cited indiscriminately in cases involving any other one.[10] As to the first class

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113 N. E. 581 (*mandamus* used like injunction in state that originally had no courts of equity). The usual distinction between *mandamus* and injunction in similar cases is extremely well explained in *State v. Lord* (1896) 28 Ore. 498, 510, 43 Pac. 471, 474. But it is submitted that in the Michigan and Massachusetts cases cited the distinction does not apply, and that an equitable remedy in effect was employed.

[5] (1915) 28 HARV. L. REV. 343, 445.

[6] *Cf. Lynch v. Knight* (1861) 9 H. L. Cas. 577, *592.

[7] See COMMENT (1917) 26 YALE LAW JOURNAL, 779; *cf.* (1920) 29 *ibid.*, 344.

[8] See (1914) 14 COL. L. REV. 243 in accord. But *cf.* (1914) 28 HARV. L. REV. 309.

[9] *Cf. Green v. Mills* (1895, C. C. A. 4th) 69 Fed. 852, per Holmes, J.; *cf.* Green, *Separation of Governmental Powers* (1920) 29 YALE LAW JOURNAL, 369.

[10] See in the instant case, which apparently falls under class 2, citations of *Walton v. Develing* (1871) 61 Ill. 201 (class 1); *Harris v. Shryock* (1876) 82 Ill. 119 (class 2); and *Spies v. Byers* (1919) 287 Ill. 627, 122 N. E. 841 (class 3). The language of the opinion in *Walton v. Develing* is imported bodily into that of the instant case at several points.

there can be no conflict. The judiciary cannot interfere with or review the lawful discretion of the coördinate branches of government.[11] Naturally this principle should make the courts careful in doing anything which *seems* so to interfere. Acts within this lawful discretion are to be clearly distinguished from purely ministerial acts on the one hand,[12] and from acts *ultra vires* (class 2) on the other. If any court seeks to restrain or review acts within this first class, its order or decree is not merely subject to reversal, but is probably void.[13] To allow interference here may well be said to attack the foundation of our system.

Equity clearly has power to restrain acts *ultra vires* and acts in pursuance of an invalid law when property rights are immediately threatened, whether an election is involved or not. In this way the constitutionality of many laws is passed upon.[14] So far as the President is concerned, it would be highly impolitic, of course, for any court to issue orders of any kind to him, and obviously it would have no power of enforcement beyond moral suasion.[15] The policy does not extend with quite the same force to the governor of a state, it would seem.[16] With reference to subordinate officers and boards courts have no hesitation in acting.

Where the rights of the complainant personally are not threatened by official acts *ultra vires,* complaint to administrative superiors for punishment for breach of duty is the usual and adequate procedure. But why deny equity the *power* to prevent such acts? It is quite possible for situations to arise in which the administrative superiors refuse to see that the law is being broken, or in which the delay necessary to take the ordinary steps means irreparable injury to the public. Equity has the power and has used it in such cases.[17] The fact that it is an election that the officer illegally threatens to hold should only

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[11] Determinations of law, however, can be reviewed. See COMMENT (1918) 27 YALE LAW JOURNAL, 550.

[12] Failure to perform these may be remedied specifically by *mandamus.* See (1915) 24 YALE LAW JOURNAL, 604. For errors of judgment in the exercise of discretion, however gross, there is no remedy but appeal to a reviewing authority, if there be one, assuming that the law authorizing the discretion is valid. For *mandamus* to force the holding of an election, see *State v. Commissioners* (1914) 93 Kan. 405, 144 Pac. 241.

[13] *Walton v. Develing, supra; Mississippi v. Johnson* (1866) 71 U. S. 475; *Morgan v. County Court* (1903) 53 W. Va. 372, 44 S. E. 182.

[14] See cases cited Am. Dig., Dec. *Injunction,* sec. 85; Cent. Dig. *Injunction,* secs. 155, 156. On the subject of suits against the state in general, see 44 L. R. A. (N. S.) 189, note.

[15] *Cf. Mississippi v. Johnson, supra.*

[16] Courts have occasionally controlled the actions of the governor, though there is considerable conflict on this point. See *State v. Cunningham, supra* (restraint of board of election commissioners, of which governor was head); (1913) 23 YALE LAW JOURNAL, 97.

[17] *People v. Tool, supra.*

make the court careful, and not deprive it of power. A privilege and power to vote at an election which is sure to be subsequently held void are not particularly sacred. The mere word "election," however, in the principal case and in two previous Illinois cases[18] led the court to lose sight of the malfeasance in office, and to deny itself power to pass on the merits. Clearly restraint of an officer acting thus may be justifiable interference with the political branch of the government.

The exact status of acts performed under a statute subsequently held to be invalid forms a very interesting problem in itself.[19] Those in which we are here interested, acts connected with elections, seem to be called in question frequently, when no property rights are involved, in cases of apportionment of representation, or gerrymandering. In *State ex rel. Lamb v. Cunningham,*[20] the secretary of state was restrained from holding an election under an apportionment statute that was held unconstitutional. The court said, "The legislature that passed the act is not as assailed, nor is its constitutional province invaded. . . . The determination may have a political effect, but that would not necessarily make the question determined a political instead of a judicial question." The Illinois court on the other hand in *Fletcher v. Tuttle,*[21] refused this same relief because the rights (*sic*) involved, namely to vote, to be a candidate, and to have the election called and held under a valid law were political and not the subject of equity jurisdiction. The question came up again under the Fourteenth and Fifteenth Amendments, when it was attempted to restrain an election under registration statutes that effectually deprived the negro of his power to vote. Chief Justice Fuller and Justice Holmes in the Circuit Court of Appeals dismissed the bill,[22] the Chief Justice on the ground that no right of property was threatened with infringement,[23] and Justice Holmes flatly on the basis of non-interference with the other departments. The circuit judge who filed an opinion in an identical case,[24] after this last decision, but before seeing the opinion, seems to have furnished a fairly adequate

[18] *Harris v. Shryock, supra; Thompson v. Mahoney* (1907) 136 Ill. App. 403.

[19] *Cf. Buck v. Eureka* (1895) 109 Calif. 504, 42 Pac. 243; *State v. Goodwin* (1898) 123 N. C. 697, 31 S. E. 221. *Cf.* COMMENT (1919) 28 YALE LAW JOURNAL, 592.

[20] *Supra.*

[21] (1894) 151 Ill. 41, 37 N. E. 683. *Matter of Reynolds* (1911) 202 N. Y. 430, 96 N. E. 87, *accord.* In Illinois it required one more year to find out that the apportionment law was valid. *People v. Thompson* (1895) 155 Ill. 451, 40 N. E. 307.

[22] *Green v. Mills, supra.*

[23] The leading New York case went on this ground, in spite of the importance of the public interest involved. *Schieffelin v. Komfort* (1914) 212 N. Y. 520, 106 N. E. 675. This case was eminently one for a declaratory judgement; *cf.* Borchard, *The Declaratory Judgment* (1918) 28 YALE LAW JOURNAL, 1, 105; and COMMENT (1920) 29 *ibid.*, 545.

[24] *Gowdy v. Green* (1895, C. C. S. C.) 69 Fed. 865.

answer to this entire argument. "I think that the rights as claimed by the plaintiffs as citizens of the United States and of South Carolina have a property value of the highest and most sacred character. These rights it is admitted the plaintiffs are deprived of; but it is insisted they have adequate remedies at law, and that equity therefore cannot entertain their complaints. I regret very much that the Court of Appeals did not indicate the character of the remedy at law. I regret also that I am unable after thorough investigation to find it."

It is submitted therefore that equity powers in matters of a political nature should be tested, not by the property interest involved or by the presence or absence of an election or of political rights, so-called, in the case, but by the character of the act to be enjoined. Once it is determined that the act is *ultra vires,* or that the law may perhaps be invalid, the case should be considered on the merits. The decision would then depend on the balance between the policy against interference with the political branch or with the freedom of elections, and the importance of the injury threatened to the public.

STOCKHOLDER'S LIABILITY FOR CORPORATE DEBTS

The theory that a corporation is a complete legal entity separate and distinct from its stockholders is receiving some severe blows. The recent case of *Louisville & N. R. R. v. Nield* (1919, Ky.) 216 S. W. 62 illustrates the point nicely. The plaintiff was the sole creditor of a corporation of which the defendant was the sole stockholder. In effect the bill alleged that the defendant, with notice of the plaintiff's claim, had wrongfully taken the corporate assets and so left the corporation insolvent, though not legally dissolved. The defendant demurred because no judgment had been secured against the corporation at law and because the corporation had not been joined as a party defendant. The court overruled the demurrer, saying that "the defendant had literally swallowed the corporation whole" and thereby placed himself under a duty to pay its debts.

It has been an established principle of corporation law that the corporation is under the primary duty to pay its own debts. So the rule, just as in the case of any debtor, would logically require a judgment at law to establish the debt as a condition precedent to the filing of a creditor's bill in equity.[1] In many states both the law and the equity action may be prosecuted in one suit by bringing both parties in as defendants.[2] But in no state, in the absence of statute, will the mere allegation of the insolvency of an *individual* debtor support a creditor's

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[1] *Swan Land & Cattle Co. v. Frank* (1893) 148 U. S. 603, 13 Sup. Ct. 691; *Gabbert v. Union Gas & Traction Co.* (1909) 140 Mo. App. 6, 123 S. W. 1024.

[2] *Wofford-Fain Co. v. Hampton* (1917, N. C.) 92 S. E. 612; *Fulton Auto Supply Co. v. Sullivan* (1918) 148 Ga. 347, 96 S. E. 875.